San Diego International Law Journal

Volume 1
Issue 1 *2000*

Article 4

5-1-2000

# Lessons from the Trade Arena: A Proposal to Change U.S. Immigration Law for the Benefit of U.S. Workers

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# Lessons from the Trade Arena: A Proposal to Change U.S. Immigration Law for the Benefit of U.S. Workers

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* Mr. Todres is an Associate with Davis Polk & Wardwell. He holds a B.A. from Clark University and a J.D. from Columbia Law School. The views expressed in this Article are solely those of the author. An earlier version of this Article was presented at a conference at Suffolk Law School, February 27, 1999. The author welcomes comments on this Article; they may be sent to the author by e-mail *jtodres@workmail.com*. The idea for the Article grew out of witnessing one individual's experience with U.S. immigration law. This woman, from a European Union country, had been doing innovative work with inner-city homeless women and children in a major U.S. city. Although she was a tax-paying, model "citizen," she was unable to obtain a H-1B visa to extend her stay. She had no desire to stay permanently in the U.S., but had hoped to stay for another year or two to continue her work. Instead, she had to return home, and her American counterparts, and the community in which she was working, were worse off as a result. What struck me was that, in addition to the "humanitarian" reasons for needing to change the way she was treated by the system, there were compelling reasons why losing temporary skilled workers like this woman hurt U.S. citizens. Her experience, and that of others like her, led to this Article, and in turn, this Article is dedicated to her.

## I. INTRODUCTION

The establishment of the World Trade Organization (WTO) and the growing movement toward a global free trade system have far-reaching implications for the United States. These events present new opportunities for the U.S. government, American business, and U.S. citizens. At the same time, they also challenge the United States to reexamine its own laws and policies. In particular, in light of increasing globalization, the United States needs to review its approach to immigration, as immigration law regulates the movement of *human* capital—perhaps the most valuable component of this new international order.

Although the United States is one of the driving forces behind the push toward free trade and the removal of all barriers with respect to the trading of goods, it has taken much more of a protectionist stance with regard to its labor market. In particular, the U.S. has developed many restrictions on foreigners seeking work in the United States. This U.S. approach creates a system where goods move freely across borders but workers do not.

Just as the achievements of the Uruguay Round[1] reflect the U.S. commitment to free trade principles, increasingly restrictive immigration laws reveal the United States' protectionist approach to labor and employment. U.S. action in these two areas seems contradictory, and

1. *See, e.g.*, David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 12 (1995). Leebron states that:

> [T]he Uruguay Round agreements achieved four basic reforms. First, they reformed the institutional structure of the GATT, including, most importantly, its dispute settlement procedures. Second, they strengthened and clarified existing GATT rules in several areas, most significantly, antidumping, subsidies and countervailing duties, and safeguards. Third, they applied GATT rules to "renegade" sectors that, although nominally subject to the GATT, had in fact been outside GATT discipline. Finally, they brought new areas into the multilateral trade regime, notably services and intellectual property.

*Id.*

yet the United States maintains that its policies in both areas are for the benefit of the U.S. worker.

This Article examines this conflict between U.S. trade and immigration law and policy and asks whether the United States could apply some of the principles underlying its free trade policy to its immigration law in a way that benefits the U.S. economy and its workers. In Part II, this Article explores how U.S. immigration law protects U.S. labor. Specifically, Part II focuses on the controversy surrounding the H-1B visa program for non-immigrants and U.S. treatment of skilled workers from other countries, as the H1-B program is a good potential starting point for a new approach to immigration law. Part III of this Article reviews U.S. trade law and policies, as well as U.S. attempts to create a global free trade system. This free trade approach is based on principles that can be effectively applied to the field of immigration. Part IV of this Article explores the lessons of free trade principles, including the benefits of increased competition and innovation. Part V of this Article details the benefits that skilled foreign workers can provide to the U.S. economy and also to U.S. workers. Finally, in Part VI, this Article proposes a different approach to the issue of foreigners working in the United States, one that is more in line with the free trade policies of the U.S. government and still protects U.S. labor. With a more open approach to foreign workers, U.S. businesses and workers could achieve significant gains.

## II. USING IMMIGRATION LAW TO PROTECT U.S. LABOR

### *A. Immigration Law Generally*

Traditionally, states, as sovereign territories, have claimed the authority to determine whether an alien is allowed entry within its borders or denied admission.[2] With this authority, states employ a number of reasons to justify their immigration laws and policies, including: (1) national security,[3] (2) the need to protect the jobs of its

2. *See* Frederick G. Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 448 (1983). *But see* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853 (1987) (challenging the use of sovereignty as a justification for granting the executive broad authority in immigration).

3. *See* Immigration and Nationality Act of 1952 § 212(a)(3), 8 U.S.C. § 1182(a)(3) (1994 & Supp. IV 1998).

citizens or to supplement labor shortages,[4] or (3) even a desire to preserve the ethnic makeup of their society.[5] In turn, political philosophers have "taken the existence of well-defined states, and thus the citizen-alien distinction, for granted" and instead have concentrated on "the internal arrangements of states, and . . . the legitimacy of governmental authority vis-a-vis citizens."[6] Some simply accept that citizens, through the state, have a collective right to determine who joins their population and how it evolves, subject to certain claims of necessity (*e.g.*, by refugees).[7] The United States has relied on all of these factors at one time or another.[8] More recently, however, Congress has focused on the need to protect U.S. jobs.[9]

In general, U.S. immigration law reflects a preference for family-based immigration, predominantly the immediate relatives of U.S. citizens and of lawful permanent residents. Not including refugees, U.S. immigration ceilings for Fiscal Year 1998 were as follows:

| | |
|---|---|
| Family-sponsored (immediate relatives & family preferences) | 480,000 |
| Employment-based preferences | 140,000 |
| Diversity (low-admission countries) | 55,000 |
| TOTAL | 675,000[10] |

Despite significantly higher number of family-sponsored immigrants, employment-based immigration has sparked far greater debate and objections.[11]

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4. Employment-related justifications for immigration laws are discussed below. *See infra* note 11 and accompanying text.

5. *See* Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 U.C.L.A. L. REV. 1425, 1436 (1995) (citing a history of xenophobia in the United States as an underlying influence on immigration law and policy).

6. Whelan, *supra* note 2, at 448.

7. *See* Michael Walzer, *The Distribution of Membership*, *in* BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 1-35 (Peter G. Brown and Henry Shue, eds., 1981). *But see* BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 88-95 (1980).

8. *See supra* notes 3-5. *See generally* EDWARD HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 (1981).

9. *See, e.g.*, 142 CONG. REC. S12297-02 (1996) (quoting letter from Jamie S. Gorelick, Deputy Attorney General, stating that "[t]he Administration seeks legal immigration reform that . . . protects U.S. workers").

10. *See* THOMAS ALEXANDER ALEINIKOFF, ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 285 (1998).

11. Many view family-based immigration as helping to reunite families members. *See, e.g.*, Howard F. Chang, *Liberalized Immigration as Free Trade: Economic Welfare*

Immigration law related to employment covers two areas: (1) employment-based immigration, for those who seek to become permanent members of U.S. society, and (2) non-immigrant visas, for those who seek to work in the United States for limited periods of time (note: the above table only includes immigrants). In both of these areas, the United States has adopted a protectionist stance, in large part to shield U.S. workers from competition. This Article covers only non-immigrant workers, since a discussion of employment-based immigrants would need to focus on additional considerations that enter into determining whether an individual should become a permanent member of U.S. society.[12]

In contrast to employment-based immigrants, a foreigner seeking to enter as a non-immigrant, in principle, does not intend to stay indefinitely in the United States, at least under the law. He or she enters the United States for employment-related reasons for a defined period of time. Still, U.S. immigration law imposes many restrictions on non-immigrants.

### *B. Restrictions on Employment-based Non-immigrants*

U.S. immigration law presumes that when an alien arrives at the border or at a consulate to apply for a visa, he or she is seeking to become an "immigrant."[13] The Immigration and Nationality Act

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*and the Optimal Immigration Policy*, 145 U. PA. L. REV. 1147, 1229 (1997) ("Family-based immigration produces the psychic benefits associated with the reunification of families, enjoyed by both the immigrant and the resident sponsor. Thus, we may offer immigration visas to relatives of immigrants not only to further the economic interests of natives but also for reasons other than economic self-interest."). In contrast, some view employment-based immigration as a threat to U.S. workers' job security. *See, e.g.*, Zach Coleman & Andy Peters, *Visa Crunch Pinches Georgia Firms*, ATLANTA BUS. CHRON., Sept. 18, 1998, at 1A ("Labor unions, anti-immigration groups and some white-collar professional associations say H-1B employees displace American workers and push down wages.").

12. Employment-based immigration brings a number of factors into play. Those who enter as immigrants are seeking permanent resident status, often with the intention of becoming citizens. As such, a number of factors may go into consideration of whether to allow individuals to enter as immigrants for employment-based categories. This Article examines only non-immigrants, so that the discussion can focus on employment-related factors and not other considerations.

13. *See* 8 U.S.C. § 1184(b) (1994). Section 1184(b) states that:

> Every alien (other than a nonimmigrant described in subparagraph (H)(i) or (L) of section 1101(a)(15) of this title) shall be presumed to be an immigrant until he establishes to the satisfaction of the consular officer, at the time of application for a visa, and the immigration officer, at the time of application

("I.N.A.") states that "[t]he term 'immigrant' means every alien except an alien who is within one of the . . . classes of nonimmigrant aliens."[14] Having the presumption that every alien is an immigrant unless he or she meets one of the exceptions under I.N.A. §101(a)(15) means that the burden rests on the alien to prove that he or she meets the requirements of one of the exception clauses. It also assumes the higher burden of proof that comes with entering as an immigrant, unless one can prove that he or she is only seeking to enter the United States for a finite period.

There are twenty-five categories of non-immigrant visas issued by the U.S. government.[15] Among the non-immigrant categories that anti-immigration groups claim pose the greatest threat to U.S. workers are the H-category of visas. The H-visa includes the following sub-categories of workers:

| Visa Category | Individuals Covered |
|---|---|
| H-1A | Temporary workers in the nursing profession |
| H-1B | Temporary workers in "specialty occupations" |
| H-2A | Temporary agricultural workers |
| H-2B | Other temporary workers, filling temporary positions |
| H-3 | Certain trainees, and alien spouses and children of any alien holding an H-category visa if accompanying or joining him.[16] |

This Article focuses on the H-1B category, since it has generated significant controversy in recent years and remains a particularly contentious issue.[17] The H-1B visa category covers aliens coming to the United States temporarily to serve in a "specialty occupation."[18] A "specialty occupation" is defined as employment that requires

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for admission, that he is entitled to a nonimmigrant status under section 1101(a)(15) of this title."

*Id.*

14. 8 U.S.C. § 1101(a)(15) (1994 & Supp. IV 1998).

15. *See* Immigration and Nationality Act of 1952 § 101(a)(15), 8 U.S.C. § 1101(a)(15) (1994 & Supp. IV 1998). For an overview of the different visa categories, *see* David Grunblatt & Philip J. Kleiner, *The U.S. Nonimmigrant System*, 1001 PLI/CORP 83 (1997).

16. *See* 8 U.S.C. § 1101(a)(15)(H) (1994).

17. Much of the controversy, centered around the debate as to whether there is a real need for skilled foreign workers, has been going on for several years. However, the debate was heightened in 1998, when Congress discussed increasing the numbers of H-1B visas. *See infra* note 32 and accompanying text. There is little controversy about the other sub-sections of the H-visa category, with the exception of the H-2. The H-2 visa merits further discussion but is beyond the scope of this Article.

18. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(b) (1994).

"theoretical and practical application of a body of highly specialized knowledge, and . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States."[19] In other words, the H-1B visa is intended for skilled workers.

The phrase "or its equivalent" warrants additional consideration, as it clarifies the intent of the H-1B visa program. The I.N.A. states that "equivalent" experience means "experience in the specialty equivalent to the completion of such degree, and . . . recognition of expertise in the specialty through progressively responsible positions relating to the specialty."[20] The regulations shed further light on this, stating that three years of specialized training or experience will generally be required as a substitute for each year of the requisite academic study.[21] In other words, in order to be considered eligible for an H-1B visa for a position that requires a bachelor's degree, an individual without a university degree would need a minimum of twelve years of specialized training or experience. As a result, few individuals qualify for the H-1B visa without a university degree.

The H-1B visa also requires significant effort by the U.S. employer seeking to hire the non-immigrant professional. The employer must present evidence that (1) the non-immigrant is qualified to work in the designated specialty occupation, and (2) the non-immigrant will perform only that work in particular.[22] In addition, the employer must file a labor condition application with the Secretary of Labor prior to submitting the H-1B application.[23] In doing so, the employer must certify that it will pay the "prevailing wage" for that position, that it "will provide working conditions for such non-immigrants that will not adversely affect the working conditions of workers similarly employed," that "[t]here is not a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment," and that the union representative is notified of the employer's intent or that a notice is posted at the place of employment if there is no bargaining representative.[24] All of these requirements aim to provide protections for

19. 8 U.S.C. § 1184(i)(1) (1994).
20. 8 U.S.C. § 1184(i)(2)(C) (1994).
21. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (1999).
22. *See* 8 C.F.R. § 214.2(h)(4)(iv)(A) (1999).
23. *See* 8 U.S.C. § 1182(n)(1) (1994 & Supp. 1998).
24. *Id.*

U.S. workers.[25]

Still, anti-immigration groups have criticized the H-1B visa program claiming that it allows foreigners to compete with a portion of the U.S. labor force that is most vulnerable to job competition.[26] Critics maintain that there are sufficient numbers of skilled American workers to meet the needs of U.S. businesses and that the program is susceptible to abuse.[27] Proponents counter by saying that the H-1B program fulfills a real need, particularly in the area of high technology.[28] One attorney summarized this need as follows: "[T]he growth of the computer industry, the internet and the global nature of our economy are producing a new component to competition. . . . [Therefore] businesses are finding it necessary to employ foreign nationals with specialized education, knowledge, skills or abilities."[29]

How much additional competition H-1B visa holders create is subject to debate. Until 1999, H-1B visas were capped at 65,000 per year.[30] In addition, the H-1B visa is initially valid for up to three years and can be extended for no more than three years, for a total maximum stay of six years.[31] In 1998 the H-1B quota was reached for the first time, leaving many businesses unable to hire the skilled workers they needed. In response, Congress passed the American Competitiveness and Workforce Improvement Act of 1998, which increased the number of H-1B visas for a period of three years (115,000 in FY1999; 115,000 in FY2000; and 107,500 in FY2001).[32]

While Congress' decision to increase the number of H-1B visas for a three-year period addresses the immediate shortage of skilled workers, it raises additional questions as to what the most effective long-term policy is. Are limitations on the numbers of skilled foreign workers really in

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25. Some have criticized the labor condition application as cumbersome and difficult to enforce. *See, e.g.*, Hiep D. Truong, *The Illegal Immigration Reform and Responsibility Act of 1996: A Cost-Effective Measure for U.S. Citizens or a Punishment for Immigrants Seeking the American Dream*, 3 DEPAUL DIG. INT'L L. 54, 57 (1997).

26. *See, e.g.*, Kunal M. Parker, *Official Imaginations: Globalization, Difference, And State-Sponsored Immigration Discourses*, 76 OR. L. REV. 691, 700 (1997) (quoting the U.S. Commission on Immigration Reform, Legal Immigration: Setting Priorities (1995)) ("'[P]otential harms' associated with immigration include . . . competition for jobs or public services with 'the most vulnerable of Americans.'").

27. *See* Constantine S. Potamianos, *The Temporary Admission of Skilled Workers to the United States under the H-1B Program: Economic Boon or Domestic Work Force Scourge?*, 11 GEO. IMMIGR. L.J. 789, 800 (1997).

28. *See id.* at 799-800.

29. Deborah A. George, *Labor Certification: The Key to Staying Competitive in a Global Economy*, 46 R.I. B.J. 5, 5 (1997).

30. *See* 8 C.F.R. § 214.2(h)(8)(i)(A) (1999).

31. *See* 8 C.F.R. §§ 214.2(h)(9)(iii)(B)(1), 214.2(h)(15)(ii)(B)(1) (1999).

32. *See* American Competitiveness and Workforce Improvement Act of 1998, Pub. L. No. 105-277, § 411, 112 Stat. 2681, 2681-642.

the best interests of the United States, its economy, or its workers? In attempting to answer this question, the U.S. approach to trade provides some useful guidance.

## III. THE UNITED STATES LEADS THE MOVE TOWARD A GLOBAL FREE TRADE SYSTEM

### *A. The U.S. View on Free Trade*

For many years, the United States has held the view that open markets and a liberalized global trading system are far more successful at promoting growth and prosperity than trade protection and isolationism.[33] The *1998 Annual Report of the Council of Economic Advisors* states "[i]n the 1990s, openness to trade and investment, combined with U.S.-led liberalization of world markets, has been essential to [the U.S.] economy's sustained expansion."[34] Today, the goal of U.S. trade strategy is free trade, and as one scholar notes, "[a] critical development is that free trade, as distinct from progressive trade liberalization, now has become an explicit policy objective."[35]

Driven by a policy that views free trade as the objective, the United States has worked to develop law that provides the means to create and ensure a free trade regime.[36] Both the North American Free Trade Agreement ("NAFTA")[37] and the WTO[38] serve as legal regimes that support the U.S. goal of a free trade system. Regarding the former, one expert writes, "NAFTA will provide numerous opportunities to business, industry, and workers. The agreement is designed to lead to a more efficient use of North American resources—capital, land, labor, and

33. *See* MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 305 (1998).

34. ECONOMIC REPORT OF THE PRESIDENT, TRANSMITTED TO CONGRESS, FEBRUARY 1998, TOGETHER WITH THE ANNUAL REPORT OF THE COUNCIL OF ECONOMIC ADVISORS 215 (1998) [hereinafter ECONOMIC REPORT].

35. Ernest H. Preeg, *From Here to Free Trade: The Quest for a Multilateral/Regional Synthesis*, *in* TRADE STRATEGIES FOR A NEW ERA: ENSURING U.S. LEADERSHIP IN A GLOBAL ECONOMY 142, 143 (Geza Feketekuty & Bruce Stokes eds., 1998).

36. *See id.*

37. *See* North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 [hereinafter NAFTA].

38. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter WTO].

technology—while heightening competitive market forces."[39]

Similarly, the WTO—formerly the General Agreement on Tariffs and Trade (GATT)—states that its goal is to contribute to "raising standards of living, ensuring full employment, and a large and steadily growing volume real income."[40] Alan Wolff writes that:

> The foremost tool of post-World War II U.S. trade policy has been and must remain the GATT [now WTO] system. There is no substitute. Given the openness of the U.S. economy and a trading system based on the most-favored-nation (MFN) principle, there is no other practical way to spread as far as possible the area of reciprocal openness. Given that U.S. well-being lies with maximum openness reciprocated by others abroad, a multilateral trading system of great breadth and scope is essential to the success of U.S. trade policy.[41]

Another expert states "[t]he WTO gives new opportunities and new tools for opening markets and challenging restrictive policies and practices."[42]

U.S. trade policy, supplemented by the WTO and NAFTA, relies on several key principles to ensure free movement of goods. Primary among these principles are most favored nation ("MFN") status, tariff reductions or concessions, and the principle of national treatment.[43]

John H. Jackson writes that the "MFN [principle] has been a central pillar of trade policy for centuries . . . . The MFN obligation has a long history that is easily traced back to the twelfth century, although the phrase seems to have first appeared in the seventeenth century."[44] By extending MFN status to a trading partner, the United States agrees to grant it the most favorable terms of trade that it grants to any trading partner.[45] Both the WTO and NAFTA rely on the principle of MFN.[46] As one example, GATT article I, which is incorporated into the WTO Agreement, states that "any advantage, favour, privilege or immunity granted by a contracting party to any product originating in or destined

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39. Dean C. Alexander, *The North American Free Trade Agreement: An Overview*, 11 INT'L TAX & BUS. LAW. 48, 48 (1993).

40. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, Preamble [hereinafter GATT].

41. Alan Wm. Wolff, *Goals and Challenges for U.S. Trade Policy*, *in* TRADE STRATEGIES FOR A NEW ERA: ENSURING U.S. LEADERSHIP IN A GLOBAL ECONOMY 360, 370 (Geza Fekeetekuty & Bruce Stokes eds., 1988). Note that this view is in stark contrast to the U.S. view on the free movement of human capital. *See id.*

42. Thomas R. Howell, *The Trade Remedies: A U.S. Perspective*, *in* TRADE STRATEGIES FOR A NEW ERA: ENSURING U.S. LEADERSHIP IN A GLOBAL ECONOMY 299, 316 (Geza Feketekuty & Bruce Stokes eds., 1998).

43. *See generally* RAJ BHALA, INTERNATIONAL TRADE LAW: CASES AND MATERIALS (2d ed. 1996).

44. JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS 157-58 (2d ed. 1997).

45. *See id.* at 157.

46. *See* GATT, *supra* note 40, art. I; *see also* WTO, *supra* note 38, art. XIII; NAFTA, *supra* note 37, art. 308.

for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[47]

Reducing or eliminating tariffs on goods is a more obvious way of promoting free trade.[48] The major multilateral trade agreements to which the United States is a party—including the WTO and NAFTA—have incorporated tariff concessions into their texts.[49] For example, NAFTA article 302 states "[e]xcept as provided for in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on any originating good."[50] Furthermore, NAFTA requires that, "each Party shall progressively eliminate its customs duties on originating goods."[51]

The third pillar in the free trade system is the principle of national treatment. Raj Bhala writes that "[t]reating domestic and imported products alike, at least in substance if not identically, is a key means for promoting free trade."[52] This is the idea behind the principle of national treatment. The United States has supported the inclusion of the principle of national treatment in a number of international agreements, in particular NAFTA and the WTO.[53] NAFTA asserts that "national treatment shall mean, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded by such state or province to any like, directly competitive, or substitutable goods, as the case may be, of the Party of which it forms a part."[54]

Although the multilateral agreements provide for exceptions in some cases to certain aspects of MFN, tariff reductions, and national treatment, this does not detract from the case for free trade. As the

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47. GATT, *supra* note 40, art. I.
48. *See* BHALA, *supra* note 43, at 225.
49. *See* GATT, *supra* note 40, art. II; *see also* NAFTA, *supra* note 37, art. 302.
50. NAFTA, *supra* note 37, art. 302(1).
51. *Id.*, art. 302(2).
52. BHALA, *supra* note 43, at 245.
53. *See* GATT, *supra* note 40, art. III. Article III states that:

> The products of territories of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

*Id.*; *see also* NAFTA, *supra* note 37, art. 301(1) ("Each Party shall accord national treatment to the goods of another Party in accordance with Article III of the General Agreement on Tariffs and Trade . . . or any equivalent provision of a successor agreement to which all Parties are party, are incorporated into and made part of this Agreement.").
54. NAFTA, *supra* note 37, art. 301(2).

global community works toward a free trade system, common sense dictates that it cannot happen overnight. As such, short-term exceptions may be made in an effort to forge agreements and to move closer to a free trade system. In general, however, U.S. support for the principles of MFN, tariff reductions, and national treatment demonstrates its commitment to an international system based on trade without barriers.

This commitment is based on support for the underlying theories of classical economics and on the U.S. perception that it benefits from a free trade system.[55] Clearly, the United States would not press for the implementation of a system in which it does not benefit. The United States has supported, and continues to support, a free trade system because free trade provides two important benefits: (1) the benefits of comparative advantage, and (2) improvements and developments driven by increased competition.[56] This latter point is particularly important, as increased competition is a primary reason for tight controls on immigration—protecting U.S. labor from foreign competition.[57]

Yet in the context of trade, the United States has long been convinced that the removal of barriers and restrictions will improve the lives of its citizens. One expert states, "[o]bviously, reducing trade barriers is important. The history of the post-war international economy, the contribution of GATT in raising living standards and spurring innovation, and the market opportunities brought on by the new World Trade Organization, are very important."[58] In fact, U.S. belief in the benefits of removing trade barriers has been so strong, that the "U.S. was willing in its role as a prime mover and inspiring force behind the multilateral treaty system, to cut its tariffs by more than its partners did . . . [which] gave the multilateral process momentum."[59]

Today, we see that the early concessions that the United States made in order to provide impetus to the process have resulted in significant benefits for the U.S. economy and its citizens. U.S. Trade Representative Charlene Barshefsky reports that:

> [T]he American economy is the strongest in the world . . . . Over the past five years, the United States has created over 14 million new jobs, accounting for over 95% of all jobs created among G-7 nations. This, in turn, has led our unemployment rate to its lowest in a generation. . . . While this stunning

55. For an explanation of the classical economics principles underlying the case for free trade, see, for example, PAUL R. KRUGMAN & MAURICE OBSTFELD, INTERNATIONAL ECONOMICS: THEORY AND POLICY (1995).

56. *See infra* notes 72-74 and accompanying text.

57. *See supra* note 26.

58. David Crane, *The New International Competitive Environment: A Canadian Perspective*, 21 CAN.-U.S. L.J. 15, 15 (1995).

59. PATRICK LAW, TRADING FREE 28 (1993).

success is attributable to many factors, trade is among the most important.[60]

The opening of U.S. borders to foreign goods in order to give the free trade movement momentum clearly has paid off for the United States and its workers.

### *B. Unfair Trade Remedies Explained*

Some may point to United States remedies for unfair trade practices as evidence that the United States does not have a truly open border with respect to trade. This argument is misleading. Historically, trade was not always free.[61] So, as the United States and other nations move toward free trade, there are still remnants of protectionist measures.[62]

More important, while it is true that there is a range of weapons that the United States can draw upon in retaliation for unfair trade practices, the goal of these measures is not to restrict trade. Rather, the goal of U.S. trade remedies—*e.g.*, section 301 actions,[63] antidumping measures, and countervailing duties—is to ensure that U.S. trading partners fulfill their obligations and follow the principles of free trade.[64] In other words, the goal is to ensure that there are no barriers to free trade.

Section 301 of the 1974 Trade Act,[65] which has been called the "most potent and controversial weapon in the U.S. trade remedy arsenal,"[66] serves as a good example. Section 301 "provide[s] the United States with leverage to enforce U.S. rights under trade agreements, resolve trade disputes, and open foreign markets to U.S. goods and services."[67]

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60. Charlene Barshefsky, *Overview*, *in* 1998 TRADE POLICY AGENDA AND 1997 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 1 (1998).

61. *See* BO SODERSTEN & GEOFFREY REED, INTERNATIONAL ECONOMICS 189-90 (1994) (noting, as one example, that during the eighteenth and early nineteenth century, tariffs were used by governments primarily as a source of revenue).

62. *See id.* at 190 ("Many impediments to trade have been abolished [since World War II] and the average level of tariffs has fallen. Protectionism is not however dead.").

63. *See infra* note 65.

64. *See, e.g., infra* note 68 and accompanying text.

65. *See* Trade Act of 1974 § 301, 19 U.S.C. §§ 2411-2420 (1994 & Supp. IV 1998). In addition to the original section 301, there are other measures, added in the Omnibus Trade Competitiveness Act of 1988, that are considered part of the "Section 301" arsenal, namely Special 301, Super 301, and the Telecommunications Trade Act of 1988. *See id.*

66. BHALA, *supra* note 43, at 1096.

67. Office of the Chief Counsel for International Commerce, Department of Commerce, *Section 301 of the 1974 Trade Act* (visited March 8, 2000) <http://www.ita.doc.gov/legal/301.html>.

Section 301 establishes two means for responding to unfair trade practices by a foreign sovereign. Under section 301(a), if the United States Trade Representative (USTR) determines that a foreign government is "violating or denying U.S. rights or benefits under a trade agreement" or has policies or practices that are "unjustifiable and burden or restrict U.S. commerce," then retaliatory measures are mandatory (with a few limited exceptions).[68] If a foreign country's actions or policies meet only the lower standard of being "unreasonable or discriminatory" and burden or restrict U.S. commerce, then retaliatory action is not mandatory, but is available at the President's discretion under section 301(b).[69]

An act of a foreign country does not have to violate a trade agreement to trigger section 301(b), but needs only be "unreasonable or discriminatory" and burden or restrict U.S. commerce.[70] Under section 301(b), an act or policy is unreasonable if "while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, [it] is otherwise unfair and inequitable."[71]

This standard is open to broad interpretation. What would result if a similar standard was applied in the context of non-immigrant visas for specialty occupations? Should the standard be that non-immigrants, who have the sponsorship of an U.S. employer, be granted a visa, unless granting such a visa is "unreasonable or discriminatory and burdens or restricts" U.S. labor? If that were the case, it would be difficult to argue for such tight restrictions on skilled foreign workers.

## IV. LESSONS FROM FREE TRADE PRINCIPLES

Classic free trade theory holds that the reduction or elimination of trade barriers between all countries will increase world economic

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68. 19 U.S.C. § 2411(a) (1994).

69. *See* 19 U.S.C. § 2411(b) (1994). Some criticize the language of section 301 as vague and too broad. For example, section 301 does not explicitly require any demonstration of actual injury to the petitioning industry, unlike antidumping or countervailing duty laws. *See* Michael K. Young, The Fundamentals of United States Trade Law and Policy 90 (unpublished manuscript on file in Columbia Law Library). Young states that "[a] restriction appears to require more direct targeting of American (or, at least foreign) goods. A burden, on the other hand, may simply be the inadvertent side-effect of some general governmental policy or process that makes it somewhat more difficult for American companies to compete." *Id.* at 91. An exploration of this issue, however, is beyond the scope of this Article.

70. *See* 19 U.S.C. § 2411(b)(1) (1994). An action may fall under section 301(a) without violating a trade agreement, though the standard is a higher one. The precise difference is difficult to determine, as the language of the statute is broad. Generally, industries petitioning the USTR will try to claim a trade agreement violation in order to strengthen their case.

71. 19 U.S.C. § 2411(d)(3) (1994).

welfare through comparative advantage, the creation of economies of scale, increased competition, and the development of more efficient domestic industries.[72] James Holbein describes the process occurring today:

> The process of economic integration and trade liberalization is accelerating throughout the world, particularly in western and eastern Europe and in the Pacific Rim. The major nations of the world are becoming more and more closely tied through trade, investment, and capital transfers. Countries that do not seize the opportunities opened up by these changes are in danger of being left behind. Those that do are able to deliver rising standards of living to their citizens. Dismantling barriers to trade and investment increases trade, which in turn spurs economic growth, productivity gains, and job creation.... Consumers benefit from lower prices and a greater variety of products. Businesses and all trading partners realize gains in efficiency. The bottom line is enhanced competitiveness for goods and services traded from liberalized economies in the global marketplace.
>
> Expanding world trade also means greater prosperity for all .... Freer trade translates into more jobs.[73]

While free trade creates many benefits, as Holbein explains, the benefits of increased competition are particularly relevant when comparing U.S. trade policy and immigration law.

### *A. The Benefits of Increased Competition*

Reducing trade barriers forces U.S. businesses to compete with other, perhaps more efficient, companies around the world. One scholar states that "[t]he importance of a liberalized trade regime . . . comes principally from [these] intensified product market pressures and new product market opportunities. Firms face competitive threats from all over the world and in turn have the opportunity to pursue competitive advantage on a worldwide scale."[74] U.S. firms confronted with more efficient competitors must either adapt or risk significant losses. In the short-term, there may be some negative implications; however, in the long-

72. *See, e.g.*, WILSON B. BROWN & JAN S. HOGENDORN, INTERNATIONAL ECONOMICS: THEORY AND CONTEXT ch. 2 (1994).

73. James R. Holbein, *The Case for Free Trade,* 15 LOY. L.A. INT'L & COMP. L.J. 19, 20 (1992).

74. Jeffrey N. Gordon, *The Shaping Force of Corporate Law in the New Economic Order*, 31 U. RICH. L. REV. 1473, 1481 (1997). This increased competition is the same benefit that U.S. antitrust laws are supposed to create on a domestic level. *See* GARY BURTLESS, ET AL., GLOBAPHOBIA: CONFRONTING FEARS ABOUT OPEN TRADE 23 (1998) ("In fact, foreign firms can help supply competition that may be weak at home, and thereby help to deliver the benefits of lower prices that U.S. antitrust laws promise.").

run, U.S. firms become more efficient and more competitive.[75] In short, free trade "enhances the welfare of all nations involved because wider markets promote competition, which enhances productivity, technological innovation, and efficiency."[76]

The auto industry serves as a good example. Initially, Japanese inroads into the U.S. auto market reduced the profitability of the big three auto makers; the U.S. industry's share of the domestic market dropped from 87% in 1974 to 79% in 1991 and profits were down.[77] This increased competition forced the U.S. auto industry to change in order to become more efficient.[78] As a result of the increased pressure from its Japanese competitors, U.S. auto makers learned Japanese production techniques (*e.g.*, just-in-time inventory controls and team-based production) and by 1994 their domestic market share had recovered to 86% and profits had increased.[79] Furthermore, U.S. auto manufacturers made additional gains in other markets worldwide—an added benefit of the increased competition.[80] The case of U.S. auto makers demonstrates how increased competition can lead to innovation, greater productivity, and improvements in efficiency.

### *B. Trade and Innovation*

Innovation and technological change are keys to remaining competitive in the global business environment. Free trade promotes innovation in a number of ways: (1) increasing competition which pushes companies to innovate, (2) providing domestic firms with greater access to new ideas from around the globe, and (3) enabling U.S. companies to import high technology equipment and know-how.[81] Professor Jeffrey Gordon explains that:

> [T]rade liberalization plays an important role because heightened product market pressure is often the progenitor of technological change. It is not that the competitive pressure can, willy-nilly, produce technological advance. However, this pressure can make such discoveries and their rapid commercial application more valuable, both defensively (protection against inroads) and offensively (new markets to conquer). On both accounts, the liberalized trade regime plays a crucial role in intensifying the competitive regime that can

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75. *See, e.g., infra* notes 77-78 and accompanying text (the U.S.-Japanese auto industry example).

76. Alberto Bernabe-Riefkohl, *"To Dream the Impossible Dream": Globalization and Harmonization of Environmental Laws*, 20 N.C. J. INT'L L. & COM. REG. 205, 208 (1994).

77. *See* Gordon, *supra* note 74, at 1481.

78. *See id.*

79. *See id.* at 1481-82.

80. *See id.*

81. *See* BURTLESS, *supra* note 74, at 23-24.

dramatically affect firm profitability as well as reshape the wage structure.[82]

If increased competition drives businesses to innovate and improve, perhaps it also can encourage workers to develop new skills and become more valuable.

While an increasingly competitive environment pushes businesses to succeed, it also serves to create new demands on business. Gordon states that the competitive environment of today has changed, "so as to place a premium on the firm's capacity to adapt quickly to changing competitive conditions."[83] Similarly, in an increasingly competitive world, workers must be able to adapt quickly. In order to do this, workers need to be adequately trained and equipped with appropriate skills, which means that they must have access to skilled personnel from whom they can learn and acquire new skills.

## V. THE BENEFITS OF FOREIGN SKILLED WORKERS TO U.S. FIRMS AND U.S. WORKERS

Skilled foreign workers offer several potential benefits. They can (1) increase the quality of the workforce, (2) bring new ideas and know-how to U.S. firms which can lead to innovation, (3) transfer new skills and knowledge to their U.S. co-workers, and (4) increase diversity in the workplace which in turn leads to many other benefits.

First, reducing restrictions on skilled foreign workers will make a larger pool of skilled workers available to U.S. companies. This will raise the overall skill level of workforces employed by U.S. companies. In addition, it should motivate U.S. workers to gain additional training and to improve their skills, in order to remain competitive.

Although some may be wary of the potential for added competition from skilled foreign workers, having additional workers in the U.S. labor market may not create as much pressure on U.S. workers as initially thought. In today's global economy, U.S. workers already compete with citizens of other nations for jobs. Furthermore, it is better for a U.S. worker that a firm choose to stay in the United States and hire a limited number of skilled foreigners to fill its needs, rather than relocate overseas, taking all of the firm's jobs with it. Allowing a greater number of H-1B workers, however, will bring some of the competition closer to

82. Gordon, *supra* note 74, at 1482.
83. *Id.* at 1478.

home. This will highlight the need for additional training of U.S. workers, which will press the U.S. government, and the private sector, to invest more in education and training programs.

Second, allowing additional skilled foreign workers should also spur innovation and other improvements in U.S. business. As the U.S.-Japanese auto industry example illustrates,[84] U.S. business can learn from the approaches and methods of production utilized in other countries. Having workers from overseas in the United States will speed up the process of organizational learning and increase the likelihood of innovation.[85]

Innovation, particularly in high-tech fields, is essential to maintaining a competitive edge. Cyril Belshaw writes that the "greater the size of the pool of knowledge and ideas," the greater the chances of innovation.[86] By being able to employ some skilled foreign workers, a corporation greatly expands the size of the pool of knowledge in the firm. Belshaw states further that:

> [T]he existence of any social relations, however minimal, implies some rate of communication, and the more effectively ideas and knowledge are communicated, the more the ideas and knowledge of each individual can be considered part of an effective pool. Each individual becomes part of a wider whole, and since each individual can tap a wider range of information and ideas, the chances of innovation are so much higher.[87]

By permitting more skilled workers to enter the U.S. workforce on a non-permanent basis, the United States would increase opportunities for innovation within its borders.

New inventions and innovations are ineffective, however, unless they come to affect and improve the production process.[88] J.E.S. Parker writes, "[t]he most potent factor in spreading this understanding would appear not to be scrutiny and absorption of publications, but the movement of personnel already versed in the new knowledge."[89] For

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84. *See supra* notes 77-78 and accompanying text. *See also* Iwao Nakatani, *Competitive Asymmetries: The United States & Japan, in* NATIONAL COMPETITIVENESS IN A GLOBAL ECONOMY 41, 44-46 (David P. Rapkin & William P. Avery eds., 1995).

85. There is an element of fiction in the term "organizational learning." It is not really that organizations learn, rather the people in the organization learn. When this new knowledge becomes sufficiently widespread within the organization, it stays with the organization even if a certain employee or manager leaves. However, it is still the individuals within the organization that have to obtain this new knowledge. As a result, "organizational learning" really represents benefits that accrue to employees as well, as they obtain new knowledge and develop new skills.

86. *See* CYRIL S. BELSHAW, THE CONDITIONS OF SOCIAL PERFORMANCE: AN EXPLORATORY THEORY 54 (1970).

87. *Id.*

88. *See* J.E.S. PARKER, THE ECONOMICS OF INNOVATION: THE NATIONAL AND MULTINATIONAL ENTERPRISE IN TECHNOLOGICAL CHANGE 21 (1974).

89. *Id.*

U.S. firms and workers to benefit from innovations made overseas (*e.g.*, the Japanese just-in-time inventory control), they must have access to the new ideas and knowledge of foreign workers.

Further, studies have demonstrated that managers get two-thirds of their information and knowledge from face-to-face meetings or telephone conversations, and only a third of their information from documents.[90] Therefore, having direct access to foreign workers provides a more effective way for managers to learn than reading industry publications about innovations in other parts of the world. Skilled foreign workers bring with them many new ideas that can benefit U.S. business and the economy. Equally important, U.S. workers can gain from working side by side with these foreign workers through the transfer of knowledge.

In examining how organizations develop and acquire knowledge, Davenport and Prusak cite numerous examples of the benefits of exchanging ideas.[91] For example,

> [i]n 1996[,] teams of leading heart surgeons from five New England medical centers observed one another's operating-room procedures and exchanged ideas about their most effective techniques in a collaborative learning experiment. The result: a 24 percent drop in their overall mortality rate for coronary bypass surgery, or seventy-four fewer deaths than predicted.[92]

Why should the exchange of ideas be confined by geography? Business is not, and likewise the exchange of ideas should not be so limited. This potential for exchange of ideas is another benefit from having access to skilled foreign workers, as they pass on ideas to their U.S. co-workers.

This potential for the exchange of ideas exceeds the assumptions of probably most managers and corporations. Davenport and Prusak state that:

> Knowledge is transferred in organizations whether or not we manage the process at all. When an employee asks a colleague in the next cubicle how to put together a budget request, he's requesting a transfer of knowledge. When a sales rep new to a territory asks the retiring rep about the needs of a particular customer, they're exchanging knowledge. When one engineer asks another in an office down the hall if he has ever dealt with a particular problem, the second

90. *See* Thomas H. Davenport, *Saving IT's Soul: Human-Centered Information Management*, HARV. BUS. REV., Mar.-Apr. 1994, at 119, 121.

91. *See* THOMAS H. DAVENPORT & LAURENCE PRUSAK, WORKING KNOWLEDGE: HOW ORGANIZATIONS MANAGE WHAT THEY KNOW xiv (1998).

92. *Id.*

engineer, if willing and able, will transfer his knowledge.[93]

Employing skilled foreign workers will help in the transfer of knowledge to U.S. workers on a daily basis, producing gains beyond what can be achieved by having senior management examine foreign countries' business practices from afar or during short visits to other countries.[94] If skilled foreigners work in the United States, the benefits accrue not only to U.S. businesses employing them, but also to their U.S. co-workers at all levels. As foreign workers contribute ideas and skills to the workplace in the United States, their U.S. counterparts will learn from them and acquire these new skills.

Drawing on the skills of foreign workers is particularly important because the United States cannot expect all of the new ideas and innovations in the global economy to come from within its own borders. Parker examined several studies in which the majority of new technical ideas of a firm were attributable to outside sources.[95] In one such study, approximately two-thirds of ideas came from outside the firm, with one-third coming from overseas.[96] Once again, the most common method of transfer of ideas was the movement of persons to new areas.[97] Thus, U.S. firms and workers must have access to skilled foreign workers if they are to benefit from the many new ideas developed in other countries.

In examining the process of innovation and transfer of knowledge, an important lesson can be learned from affirmative action and efforts to increase diversity in the workplace. Affirmative action is no longer viewed as only a means of remedying past discrimination; businesses now view it as providing a number of benefits including increased productivity.[98] Thus:

> [T]he benefits of affirmative action do not accrue merely to women and minorities, but to each firm as a whole, and to all employees of each firm. When diversity in the workplace leads to a competitive advantage for a company, then even white male workers may be said to benefit from affirmative action programs.[99]

Similarly, benefits of employing workers from different countries and cultures accrue not only to the foreign workers but also to their U.S.

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93. *Id.* at 88.

94. The latter approach relies on top-down dissemination of information, which is not always very effective.

95. *See* PARKER, *supra* note 88, at 25.

96. *See id.*

97. *See id.* at 26.

98. *See generally* Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658 (1989).

99. *Id.* at 668.

counterparts.

A more diverse workforce can produce a range of ideas in "new product development, strategic planning, and general problem solving."[100] In addition, drawing on the ideas of a diverse workforce may help U.S. businesses market products more effectively.[101] Many companies "believe that they compete more effectively in an international marketplace when they have a diverse work force because there is greater understanding of differing points of view."[102] In an increasingly international marketplace, consumers come from a continually broader range of cultures and backgrounds. Thus, the argument that U.S. businesses reap the benefits of diversity from affirmative action policies appears equally applicable to businesses employing foreign workers. These workers should provide the same benefits that incorporating minorities and women into the workforce did, only on an international scale. These benefits include "increased productivity, more efficient human resources management, improved customer relations, marketing innovations, and more successful recruitment."[103]

There are additional benefits that skilled foreign workers provide. Skilled foreign workers usually have higher incomes and pay more in taxes.[104] Howard Chang maintains that "[a]s long as they make a positive contribution to the public sector, there is in general no economic justification for excluding these immigrants."[105]

Finally, the notion that immigrants have a negative impact on wages and employment opportunities for U.S. citizens appears to have little factual support.[106] However, even if immigration controls would result in higher wages for U.S. workers, which does not appear to be the case, these costs to employers no doubt would be passed on to consumers in

100. *Id.* at 668-69
101. *See id.*
102. *Id.* at 669.
103. Jeffrey S. Byrne, *Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workforce Diversity*, 11 YALE L. & POL'Y REV. 47, 72 (1993).
104. Moreover, since non-immigrants are in the U.S. usually for only a few years, they do not withdraw benefits, such as Social Security, when they are older.
105. Chang, *supra* note 11, at 1165. Chang then states that "quantitative or other protectionist restrictions on their immigration should be eliminated." *Id.*
106. *See* Rachel M. Friedberg & Jennifer Hunt, *The Impact of Immigrants on Host Country Wages, Employment and Growth*, 9 J. ECON. PERSP. 23, 42 (1995).

the form of higher prices for goods.[107] Thus, higher wages would be spent on higher priced goods, with little real benefit accruing to workers.

## VI. IS THERE ROOM FOR APPLICATION OF FREE TRADE PRINCIPLES IN IMMIGRATION?

The evidence above demonstrates that the United States and its workers benefit from the comparative advantage and increased competition that come with the free trade in goods. Reducing and eliminating barriers has strengthened the U.S. economy and created new jobs.[108] Despite this, any discussion of reducing immigration barriers, for either immigrants or non-immigrants, immediately raises concern among those interested in protecting U.S. labor.[109] As a result, the United States invests considerable resources in the Immigration and Naturalization Service ("I.N.S."), the Department of Labor, and other agencies, in order to ensure that foreign workers are admitted only under very limited circumstances.[110]

The United States could utilize the resources it spends on monitoring immigration in a much more effective fashion. The U.S. approach to trade in goods provides an instructive model. With respect to trade, the approach is not to invest in erecting barriers, but to strive to make U.S. businesses more efficient and more competitive in the global market.[111] Similarly, with respect to U.S. labor, the United States should invest in

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107. *See, e.g.*, Chang, *supra* note 11, at 1158.

108. *See supra* note 60 and accompanying text.

109. *See* Coleman & Peters, *supra* note 11, at A1.

110. What percentage of the estimated $308 million for "investigations and intelligence" or the total estimated $3.866 billion in the I.N.S. FY2000 budget went to immigrant or non-immigrant employment-related cases? How much consular staff time and resources are consumed by this process? Precise figures are difficult to obtain. However, discussions between the author and several individuals in the field reveal that a significant amount of time and money have been invested by the I.N.S., the Department of Labor, the U.S. Customs Service, overseas embassies and consulates, and other government entities in order to screen applicants as well as administer the employment visa program and the labor certification program.

111. For example, the U.S. Small Business Administration (SBA) alone offered $9.8 billion in loans to businesses in FY2000. *See President Clinton's New Opportunity Agenda Proposes Record Level of Investment, Financial Assistance for America's Small Business*, U.S. SBA PRESS RELEASE (visited Feb. 7, 2000) <http://www.sba.gov/aboutsba/2001 budget/00-07.html>. The release also states that:

> The President's budget proposal [for FY2001] would expand SBA's core financial assistance programs: $11.5 billion in guaranteed loans for small businesses, up from $9.8 billion in FY2000; $2.5 billion in venture capital support for investments in small businesses; $3.75 billion in loans under the 504 Certified Development Company (CDC) program, and $60 million for Microloans, up from $30 million.

*Id.*

making U.S. workers more competitive by improving skills, and not in preserving barriers. If the U.S. worker is the most qualified candidate, and there are adequate salary protections (as already exist in the H-1B visa program),[112] then the U.S. worker will get the job. A good starting point is the H-1B visa program, and the United States should look to reduce the barriers that currently exist for skilled foreign workers.[113]

If the United States took this step of reducing barriers in the H-1B program, the logical result would be an increase in the number of university-educated foreign workers coming to work in the United States. This should not frighten U.S. workers, nor should they worry about job security.[114] First, the numbers in the H-1B program are still relatively small. More important, this change must not occur in isolation; the U.S. government must invest significant resources in the training and education of its citizens at the same time.

If greater numbers of educated foreign workers arrive with skills, several events likely would occur. The overall skill level in the work force would increase, resulting in improved productivity and innovation for U.S. businesses. Improved productivity would strengthen U.S. businesses, and U.S. companies would grow. This growth would lead to the creation of new jobs. That should alleviate some of the pressure on U.S. workers. Second, U.S. workers will learn from their foreign counterparts and develop new skills as a result.[115] Finally, the increased competition from foreign workers will highlight weaknesses in the U.S. labor force, which will enable the government and private sector to better target these areas with additional training programs and

112. *See supra* text accompanying note 24, regarding the "prevailing wage" requirement.

113. While skilled foreign workers are a good starting point, there may well be limitations to the application of trade principles to immigration for the benefit of U.S. workers. For example, this model may not extend to the case of unskilled foreign labor. The full extent of the application of this proposal is beyond the scope of this Article, but merits further consideration.

114. Concern over job security may not be warranted in general. Ellen Frost reports that the U.S. market has created far more jobs over the past five years than Europe or Japan, that U.S. unemployment is low, and that "job turnover is a normal feature of the American labor market: On average, 400,000 Americans change jobs every week; about 15 percent of the workforce each year. So why are Americans feeling that their jobs are threatened by trade?" Ellen L. Frost, *Gaining Support for Trade from the American Public, in* TRADE STRATEGIES FOR A NEW ERA: ENSURING U.S. LEADERSHIP IN A GLOBAL ECONOMY 65, 67 (Geza Feketekuty & Bruce Stokes eds., 1998).

115. *See supra* Part V.

education.[116]

In other words, liberalization of U.S. immigration policy must come hand in hand with investment in training and education for U.S. workers. At present, there is significant evidence that the United States needs much greater investment in training and education.[117] As Eli Ginzberg writes:

> The ability of a society to survive and to prosper depends first on its having institutions in place to provide members of each generation with the values, knowledge, and skills that will enable them to meet the challenges they will encounter as they grow up and assume their adult roles as workers, parents, and citizens. An individual will not be able to recognize, much less meet, the range of challenges he will encounter unless he has been trained.[118]

In the end, if the U.S. worker has the necessary training and is the most qualified person for the position, he or she will get the job.

Furthermore, concerns that U.S. labor will be undercut by foreigners who will work for less are overstated in this scenario. First, under the H-1B program, the issue is skilled foreign workers. These workers are less likely than unskilled laborers to agree to below-market wages as their skills provide them with other options. For example, a university-educated European worker will not necessarily choose to work in the United States if he is only offered dramatically reduced wages. Second, some wage protections already exist, and U.S. law should continue to require that an employer pay a foreign worker at a rate at least equal to the prevailing wage.

The United States stands to benefit greatly from a more open policy toward skilled non-immigrants seeking to work in the U.S. for limited periods of time. In the long run, U.S. businesses will become more competitive, new jobs will develop, and U.S. workers will become better trained and will develop new skills.

The *1998 Annual Report of the Council of Economic Advisors* captures the issue confronting the United States today, stating:

> The benefits to an economy from international trade are of two types: static gains provide a one-time increase in income, whereas dynamic gains result in a more or less permanent increase in the economy's rate of growth. The former

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116. *See, e.g.*, PORTER, *supra* note 33, at 725 ("While there is great strength at the highest educational levels [in the United States], the average quality of human resources is lagging behind that of other advanced nations . . . . A fundamental commitment to upgrading human resources is necessary.").

117. One only needs to look at how American students compare with their counterparts in other countries to see that American test poorly in comparison. *See* Associated Press, *U.S. Math, Science Scores Fall Below Other Nations; High School Seniors Beat Only Cyprus, South Africa*, BALTIMORE SUN, Feb. 25, 1998, at 3A. *See also* Associated Press, *U.S. Schools Reported Lagging, Gap with Europeans Cited in Preparing Pupils for Work Force*, BOSTON GLOBE, July 5, 1995, at 21.

118. ELI GINZBERG, THE HUMAN ECONOMY 63 (1976).

> can be significant, but it is the accumulation over time of the latter that can generate much larger improvements in living standards.[119]

The U.S. support of free trade demonstrates its strong preference for long-term dynamic gains. If the United States adopts a similar approach in the field of immigration, it will begin to enjoy the many benefits that skilled foreign workers are able to provide to the economy and to U.S. workers.

119. ECONOMIC REPORT, *supra* note 34, at 236.